Supreme Court, U.S.
FILED
MAY 19 1995
CLERK

No. 94-1671

In The

Supreme Court of the United States

October Term, 1994

Deborah Quick Scales,

Petitioner,

v.

The George Washington University,

Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals
For the District of Columbia Circuit

PETITIONER'S REPLY BRIEF

Wendu Mekbib
Attorney and Counsel of Record for Petitioner
2155 Evans Court # 304
Falls Church, Virginia 22043-2129
Telephone (703) 734-1025

BEST AVAILABLE COPY

TABLE OF CONTENTS

SUBJECT	PAGE
INTRODUCTION	1
I. THE ARGUMENT THAT PETITIONER WAIVED HER SEVENTH AMENDMENT JURY TRIAL RIGHTS IS PREPOSTEROUS	1
II. PETITIONER NEVER WAIVED OR IN ANY WAY DIMINISHED HER CHALLENGE TO THE DISTRICT JUDGE'S IMPARTIALITY	3
III. AMERICAN JURISPRUDENCE SHOULD NOT BE TARNISHED WITH A HOLDING THAT A FEDERAL JUDGE, MANDATED BY LAW TO AVOID EVEN THE APPEARANCE OF PARTIALITY, MAY SIT IN JUDGMENT OF CONDUCT, OMISSIONS AND EMPLOYMENT PRACTICES OF HIS DOCTORS, NURSES AND HOSPITAL	6
IV. "MUCH ADO ABOUT NOTHING" - THERE WAS NOTHING WRONG WITH PETITIONER'S TRIAL STRATEGIES	6
V. REPLY TO RESPONDENT'S "COUNTER STATEMENT OF THE CASE"	7
CONCLUSION	10

TABLE OF AUTHORITIES

Cases	Page
Davis v. Board of School Commissioners of Mobile County, 517 F.2d 1044 (5th Cir. 1975); cert. denied 425 U.S. 944	5
Lieberman v. Gant, 630 F.2d 60 (2nd Cir. 1980)	7
Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988)	5
Lytle v. Household Manufacturing, Inc., 494 U.S. 545 (March 20, 1990)	3
McNeil v. McDonough, 515 F.Supp. 113 (D.N.J. 1980)	7
Noli v. C.R.I., 820 F.2d 1521 (9th Cir. 1988)	5
Potashnick v. Port City Construction Co., 609 F.2d 1101 (CA5 1980); cert. denied 449 U.S. 820	5
Whack v. Peabody & Wind Engineering Co., 595 F.2d 190 (3rd Cir. 1979)	7
Worthy v. U.S. Steel Corp., 616 F.2d 698 (3rd Cir. 1980)	7

STATUTES

Rule 38, Federal Rules of Civil Procedure	**1, 2**
Rule 39, Federal Rules of Civil Procedure	**2, 3**

PETITIONER'S REPLY BRIEF

INTRODUCTION

Petitioner respectfully submits this Reply to the Respondent's BRIEF IN OPPOSITION ("BIO") to address arguments first raised in the BIO. More importantly, the Reply is needed to rectify substantially misleading representations which pervade the contents of the BIO.

I. THE ARGUMENT THAT PETITIONER WAIVED HER SEVENTH AMENDMENT JURY TRIAL RIGHTS IS SIMPLY PREPOSTEROUS

The BIO advances the argument that Petitioner (Scales) waived her Seventh Amendment jury trial rights by failing to raise her argument in a timely manner [BIO p. 15 et. seq.] It is apparent that Respondent's counsels can benefit from a refresher course in Federal Rules of Civil Procedure. The procedures that govern the demand as well as waiver of Seventh Amendment jury trial rights are well ordained in the Federal Rules of Civil Procedure [F.R.Civ.P.].

Rule 38, F.R.Civ.P., provides:

> "(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.
>
> "(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefore in writing at any time after the commencement of the action .... Such demand may be indorsed upon a pleading of the party.
>
> "(c) Same: Specification of Issues. In the demand a party may specify the issues which the party wishes to be

tried; otherwise the party shall be deemed to have demanded trial by jury for all of the issues so triable ...."

Consistent with this fundamental Rule, Petitioner DEMANDED her jury trial rights by indorsing in her pleading (Complaint) the following:

"DEMAND JURY TRIAL ON ALL ISSUES TRIABLE BY RIGHT TO A JURY."

Rule 39, F.R.Civ.P., provides:

"(a) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by a jury, unless (1) the parties or their attorneys of record, by written stipulation made in open court and entered into the record, consent to trial by the court sitting without a jury or (2) the court by motion of its own initiative finds that a right of trial by jury of some or all of the issues does not exist under the Constitution or statutes of the United States."

At no point through the course of the district court's protracted proceedings has the Petitioner so much as suggested that she waived her right to jury trial on a single issue or departed from her demand that she be granted her Seventh Amendment right to jury trial on all issues triable by right to a jury. These are the procedural rules that control the demand and enforcement as well as waiver of jury trial rights. What cannot be denied, modified or manipulated out of existence is Petitioner's demand for her rights in accordance with the controlling law.

Despite her demand and constitutional entitlement, the district judge, whose fairness and impartiality might reasonably be questioned, chose to engage in nearly three years of protracted summary proceedings by means of which he erroneously and summarily dismissed every single count and issue that would have entitled Scales to her Seventh Amendment demand.

Scales appealed the erroneous summary rulings to the court below. In turn, the appeals court upheld the dismissals of the district judge without ever addressing whether the summary rulings of the district court departed from the Standards of Review on summary judgments. Instead, the appeals court ruled, on NOVEMBER 28, 1994, that "REGARDLESS" of whether or not the district court correctly dismissed Scales' causes of action, she is estopped from pursuing them because she did not succeed in her equitable (juryless) Title VII claims. The ruling unequivocally conflicts with this Court's decision in Lytle v. Household Manufacturing, Inc., 494 U.S. 545 (March 20, 199) and the Seventh Amendment.

Within three weeks from the date of this erroneous judgment, Scales filed a Petition for Rehearing [on December 16, 1994] reminding the court of its deviations from Constitutional mandates. The Petition was denied on January 17, 1995. Not only that Scales has raised and demanded her Seventh Amendment right in accordance with the controlling law, but there is simply no room to suggest that any of her demand was untimely. As for Respondent's claim that the appeals court ruling is "harmless error," suffice it to note that judicial deviation from Constitutional mandate is never harmless error.

II. PETITIONER NEVER WAIVED OR IN ANY WAY DIMINISHED HER CHALLENGE TO THE DISTRICT JUDGE'S IMPARTIALITY

The Respondent asserts that Scales' failed to preserve "the right to attack the trial court's partiality" and that, somehow, she waived her right to do so BIO, pp. 24-28. This is a gargantuan misrepresentation.

For a period of three years, the district judge "remained silent" and failed to disclose the doctor-patient, hospital-patient relationship he created with the defendant - petitioner's employer of over 21 years. In the course of disqualifying prospective jurors for less reason than he had to disqualify himself, the judge chose to mention his own doctor-patient, hospital-patient relationship with the defendant. He stated:

"THE COURT: THAT BRINGS UP A QUESTION. I SHOULD HAVE TOLD YOU THIS BEFORE. BUT I WAS A PATIENT AT GW HOSPITAL SOME THREE YEARS AGO. I DON'T KNOW WHETHER I BROUGHT THIS UP BEFORE, BUT IT SHOULD BE BROUGHT UP. I DON'T CONSIDER IT A DISQUALIFYING FACTOR. [APX, pp. 148-149]

"MR. MEKBIB: WELL, YOUR HONOR, THAT WOULDN'T CONCERN ME **SO LONG ... [INTERRUPTION BY JUDGE.** BUT FOR THE INTERRUPTION, THE COMPLETE SENTENCE WAS: WELL, YOUR HONOR, **THAT WOULDN'T CONCERN ME SO LONG AS THE JURY'S VERDICT CONTROLS THE OUTCOME OF THE CASE**."]

BUT THE JUDGE DIRECTED: "DON'T SAY ANYTHING NOW."

RULED: "I AM NOT GOING TO RECUSE MYSELF."

HE ALSO ADVISED: "YOU MAY NEED THIS ON APPEAL."

HE FURTHER RULED: "THE DECISION ABOUT WHETHER IT IS DISQUALIFYING IS MINE."

HE FURTHER ADVISED: "YOU DON'T WAIVE ANY CLAIM ABOUT IT, BUT I WANT YOU TO KNOW IT." [APX, pp. 148-9.]

Against the background of this transcript, the Respondent's representation to this Court that Petitioner expressly waived her challenge by stating "that wouldn't concern me" [at p. 24] is evidence of the sanctionless process in which attorney misconduct has been allowed to fester. It should be remembered that this misrepresentation is made by the same army of the Respondent's attorneys who were aware for years of the judge's relationship with their client, had remained silent all through the lower court proceedings and benefitted from a multitude of

summary judgments dismissing Petitioner's legitimate claims by a judge whose impartiality might reasonably be questioned.

While the Petitioner is under no obligation to convert a federal courtroom into an African banana market by arguing with the judge about his rulings and instructions, the procedures for challenging the judge's impartiality are set forth by law.

At the outset, Section 455 "is self enforcing on the part of the judge" and envisions sua sponte disqualification of judge when his/her impartiality might reasonably be questioned. Potashnick v. Port City Construction Co., 609 F2d 1101 (CA5, Ala. 1980); cert. denied, 449 U.S. 820; Davis v. Board of School Commissioners of Mobile County, 517 F2d 1044 (5th Cir. 1975); cert. denied, 425 U.S. 944; Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988).

A challenge to a judge's partiality may be raised by a party "BY MOTION IN A TRIAL COURT, ON APPEAL THROUGH ASSIGNMENT OF ERRORS, BY INTERLOCUTORY APPEAL, OR BY MANDAMUS." Davis, op. cit., 1045-6. It has also been held that "FAILURE TO MOVE FOR RECUSAL AT TRIAL LEVEL DOES NOT PRECLUDE RAISING ON APPEAL ISSUE OF RECUSAL ON BASIS JUDGE SHOULD HAVE DISQUALIFIED HIMSELF." Noli v. C.R.I., 860 F2d 1521, 1522 (9th Cir. 1988].

In the case at bar, the judge himself has concluded that Petitioner did not "waive any claim" about her challenge to his impartiality. He also directed that the issue be raised "on appeal." Petitioner did precisely that - raise the issue on appeal as directed by the judge and in accordance with the controlling law. There is absolutely no issue of waiver.

As for Respondent's suggestion that the judge's violation of Section 455 be deemed "harmless error," suffice it to note that judicial violation of the mandates and will of Congress is always harmful - a citizen is languishing in protracted litigation for over eight years while awaiting to be heard by a judge whose impartiality might not be reasonably questioned and by a jury of her peers!

III. AMERICAN JURISPRUDENCE SHOULD NOT BE TARNISHED WITH A HOLDING THAT A FEDERAL JUDGE, MANDATED BY LAW TO AVOID EVEN THE APPEARANCE OF PARTIALITY, MAY SIT IN JUDGMENT OF THE CHALLENGE TO THE CONDUCT, OMISSIONS AND EMPLOYMENT PRACTICES OF HIS DOCTORS, NURSES AND HOSPITAL

The Petition before this Court is not only one that depicts the judge's unequivocal deviation from the Congressional mandates of Section 455 but leaves no room to debate the reasonable and objective perception that the judge's impartiality may be questioned. If the Petition for Writ of Certiorari is denied by this Court, American Jurisprudence would inevitably be tarnished with the unconscionable conclusion that a federal judge may retain standards of fairness and impartiality and adjudge the conduct of a hospital institution whose nurses, doctors and administrators were responsible for the sustenance of his life.

IV. "MUCH ADO ABOUT NOTHING" - THERE WAS NOTHING WRONG WITH PETITIONER'S TRIAL STRATEGIES

Desperation is the mother of fabrication. This appears to be the rationale for the denigration of Petitioner's trial strategies [BIO, pp. 6-11]. There was nothing wrong with Scales' trial strategies. Proffer of defendant's articulated, nondiscriminatory reasons during Scales' case-in-chief is consistent with recognized methods of Title VII trials. Thus, the leading treatise on Employment Discrimination Law instructs:

> "Although McDonnell Douglas and its progeny outline the order and allocation of proof as a three-stage process, it is clear that the presentation of evidence does not contemplate a trifurcated trial, but simply sets forth the proper method of analysis after the relevant evidence is before the court. Evidence relating not only to the plaintiff's prima facie case, but also defendant's articulated nondiscriminatory reason and the plaintiff's

demonstration of pretext, is frequently presented during the course of the plaintiff's case in chief." Schlei & Grossman, Employment Discrimination Law, (Second Edition, BNA, Inc./ABA, 1986) pp. 1321-1322.

In further support, please see, inter alia, Worthy v. U.S. Steel Corp., 616 F.2d 698, 701 (3rd Cir. 1980); Whack v. Peabody & Wind Engineering Co., 595 F.2d 190, 193 (3rd Cir. 1979); McNeil v. McDonough, 515 F.Supp. 113, 125-6 (D.N.J. 1980); Lieberman v. Gant, 630 F.2d 60, 65-66 (2nd Cir. 1980).

Had the case been tried before a judge whose fairness and impartiality might not be reasonably questioned, the merits and value of Scales' trial strategies would have become apparent.

V. REPLY TO RESPONDENT'S "COUNTER STATEMENT OF THE CASE"

The Respondent's effort to deny its segregation of jobs on racial lines or its policies of parti pris [BIO p. 3 et. seq.] is belied by the facts.

In the Department of Nursing alone, of the 509 incumbents in "Nursing Management" positions, 449 are white, only 61 are black. All 6 of the nursing administrators are white. Only 2 of the 22 Associate Directors are black. The last black to serve in this position was terminated in 1984. The positions have since remained all white. In the Nursing Unit Coordinator position [for which Petitioner was a candidate], 52 of the 60 NUCs are white, only 5 are black. Eleven of the 12 Nurse Reviewers are white, 1 is black; 16 of the 18 Nurse Specialists are white, 1 is black; 44 of the 45 Clinical Nurse Specialists are white, 1 is black; 62 of the 66 Mid-Level Practitioners are white, only 2 are black. All of the Nurse Recruiters, Nurse Anesthetist, Epidemiologist, Nursing Research Coordinators are white. [Please see APX. pp.272-276.]

By contrast, that racially segregated "understructure of black underpaid workers {who have} lost pride in themselves" represent over 69 percent of the clerical, para-professional and menial job categories. They represent 81.8 percent of the patient escorts (216 of 264 employees); 100 percent of the nursing division assistants; 79.6 percent of the LPNs; 72.8 percent (501 of 688 employees) of the station

secretaries; 79.3 percent (249 of 314) of the nursing assistants. Overall, out of 2,967 of employees in these semi-skilled and menial job groups, a whopping 2,056 are black. [Please see APX. pp. 278-281.]

As acknowledged by the defendant's own expert witness, Lance Seberhagen, his own data and analysis shows differences in mobility between black and white nurses "that white nurses end up in nursing unit coordinator positions, which they leave at a faster pace than black nurses do." [Please see APX. pp.258-9.]

More importantly, **the probative value of Scales' statistical evidence is acknowledged by the judge himself.** To wit:

> "THE COURT: THERE IS ONE PART OF DR. WORK'S WORK THAT DID NOT ENCOUNTER TECHNICAL, STATISTICAL OBJECTIONS WHICH HAS HIS PROFILE, THIS TABLE OF ORGANIZATIONS, OF THE VARIOUS ELEMENTS OF THE HOSPITAL [i.e. Scales' statistical data at APX pp. 272-286] ....
>
> "THE COURT: **THE WHITE TOP AND MINORITY (BLACK) BOTTOM** ....
>
> "THE COURT: LET ME JUST SAY THIS TO YOU (addressing defendant's lead counsel)
>
> **"THE COURT: THERE IS A GROSS IMPRESSION CREATED BY THAT TABLE, THOSE TABLES, THAT THERE IS OVER-REPRESENTATION OF WHITES FIRST IN THE TOP MANAGEMENT OF THE NURSING BUSINESS, IN THE MIDDLE ELEMENT WHERE MS. SCALES WAS, AND A GROSS UNDERREPRESENTATION OF WHITES IN THE LOWER LEVEL** ....
>
> "THE COURT: NOW, THAT'S A PICTURE ....
>
> **"THE COURT: NOW, IS THAT RELEVANT? NOW, ARE YOU TELLING ME [addressing Mr. Frazier, defense lead counsel] THAT THAT PICTURE ISN'T COMPETENT, ISN'T PROBATIVE, OR WHAT?**

"MR. FRAZIER: ... THE PROBLEM ALSO IS WE HAVE TO LOOK TO THE FACT THAT THERE ARE DIFFERENT QUALIFICATIONS REQUIRED AT DIFFERENT LEVELS, DIFFERENT EXPERIENTIAL QUALIFICATIONS. **THERE ARE UNDOUBTEDLY PEOPLE [meaning "Negroes"] AT THE UNIVERSITY WHO HAVE BEEN A STAFF NURSE FOR MANY, MANY YEARS WHO ARE STILL STAFF NURSES NOW, AFTER HAVING BEEN STAFF NURSES FOR 10 YEARS, FOR 15 YEARS, FOR 20 YEARS, WHO HAVE NO INTEREST IN MANAGEMENT, WHO HAVE NO MANAGEMENT SKILL. THAT IS NOT WHAT THEY WANT TO DO.**

"THE COURT: YOU KNOW, I USED TO HEAR THAT 30 YEARS AGO. THEY DON'T REALLY WANT TO GO TO SCHOOL ....

"THE COURT: IS THIS PICTURE (i.e. the picture drawn from Scales' statistical evidence) TO BE DISREGARDED BY TRIER OF FACT? ....

"THE COURT: AND HOW? ...

"THE COURT: WHAT AM I SUPPOSED TO DO WITH THAT FACT? IT DOESN'T REQUIRE MUCH EXPLANATION, DOES IT?"

[Transcript of the Bench Trial proceedings, Wednesday, May 5, 1993, Volume 12, pp. 12-121 through 12-124]

Petitioner did not suffer the adverse judgments against her because of her trial strategies or lack of evidence to support her. She lost because her case was not tried before a judge whose impartiality might not be reasonably questioned.

CONCLUSION

For the above reasons, Certiorari should be granted to review the judgment and order below, summarily reverse the judgment and order of the D.C. Circuit, mandate the recusal of the district judge and remand the case [the Section 1981, breach of contract, fraud, intentional infliction of emotional distress and Title VII claims] for jury trial and adjudication by a district judge whose impartiality might not be reasonably questioned.

RESPECTFULLY SUBMITTED,

WENDU MEKBIB
Attorney and Counsel of Record
for the Petitioner
2155 Evans Court # 304
Falls Church, Virginia 22043-2129
Telephone: (703) 734-1025